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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

DALE WILLS, Petitioner, **v.** **JAMES TILTON, Director of the California Department of Corrections and Rehabilitation, and KEN CLARK, Warden of the Corcoran State Prison,** Respondents.	C 07-3354 CW (PR)

REPLY TO PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THE PETITION FOR WRIT OF HABEAS CORPUS DUE TO PETITIONER'S FAILURE TO COMPLY WITH THE STATUTE OF LIMITATIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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INTRODUCTION

On October 16, 2007, Respondents moved to dismiss Petitioner's Petition for Writ of Habeas Corpus on the grounds that Petitioner has failed to comply with the statute of limitations set forth at 28 U.S.C. § 2244. (Docket No. 8.) On January 18, 2008, Petitioner filed a Memorandum of Points and Authorities in Opposition to Respondents' Motion to Dismiss ("Opposition"). (Docket No. 15.) On January 22, 2008, Petitioner filed a Declaration in Support of his Opposition. (Docket No. 16). What follows is our reply to the Opposition and Declaration.

ARGUMENT

PETITIONER HAS FILED AN *UNTIMELY* PETITION FOR WRIT OF HABEAS CORPUS; ACCORDINGLY, THIS COURT SHOULD DISMISS THE PETITION WITH PREJUDICE

Preliminarily, we note that in his Opposition, Petitioner does not dispute that on May 23 and 24, 1996, an Alameda County Superior Court jury convicted him of one count of first degree burglary, Cal. Penal Code § 459, one count of grand theft, *id.* at § 487, found true the allegation that he had a prior 1988 felony conviction for burglary, Cal. Penal Code § 667(a), which also constituted a "strike" under California's "Three Strikes" Law, *id.* at 667(e)(1), 1170.12(c)(1), and found true the two allegations that Petitioner had previously served prior prison terms, *id.* at § 667.5(b). *See* Exh. A at 5-10.[1/] Petitioner also does not dispute in his Opposition that his direct review process ended and his conviction became final on August 9, 1997.

Petitioner does dispute our reading of the breadth of his Petition for Writ of Habeas Corpus. As we originally read Petitioner's federal habeas application, we believed he was raising three distinct claims, two of which we believed had multiple sub-claims. More specifically, we read the Petition as alleging (1) numerous acts and omissions of trial counsel that amounted to ineffective assistance of counsel; (2) numerous acts and omissions of appellate counsel that amounted to ineffective assistance of counsel; and (3) one act of prosecutorial misconduct. Motion to Dismiss at 3-4. Petitioner has corrected us. He asserts he is only raising one allegation of ineffective assistance of trial counsel, one allegation of ineffective assistance of appellate counsel, and the allegation of prosecutorial misconduct. Opposition at 13-14. We read Petitioner's papers as claiming that he received ineffective assistance of trial counsel *in numerous respects* at his 1996 trial, Pet. at 5-13; Memo in Support at 5-16, including that counsel unreasonably failed to move to strike the prior burglary conviction as invalid because even though Petitioner had pleaded guilty to the burglary charge in 1988, it was his own home he allegedly burglarized, and under California law

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1. Citations to "Exhibits" herein are the exhibits Respondents lodged with the October 16, 2007 Motion to Dismiss. (*See* Docket No. 16.)

"a person cannot burglarize his or her own home." Pet. at 5-8, 12; Memo in Support at 5-10, 12-14 (citing *People v. Davis*, 18 Cal. 4th 712, 721, 76 Cal. Rptr. 2d 770, 958 P.2d 1083 (1998); *People v. Gauze*, 15 Cal. 3d 709, 714, 125 Cal. Rptr. 773, 542 P.2d 1365 (1975)). We believed Petitioner was also contending that trial counsel performed unreasonably in numerous other ways that prejudiced him with respect to guilty verdicts of first degree burglary and grand theft (and quite apart from the prior-conviction finding). *See* Pet. at 10; Memo in Support at 8-10-11, 14-15. As noted, Petitioner asserts that Respondents have misread his habeas petition. He asserts that with respect to IAC he is *only* seeking relief on the ground that trial counsel provided ineffective assistance in not moving to strike the 1988 prior conviction. Opposition at 13 ("the remaining issues are not presented as 'independent bases for relief,' but, rather, as aggravating circumstances to demonstrate both the extent of counsels' deficient performance and prejudice involved.") And Petitioner's allegation of prosecutorial misconduct is related only to the 1988 prior burglary conviction allegation—petitioner argues that the prosecutor gave a "false impression of facts to the jury . . . These material facts consist of the prosecutor convincing the jury that Petitioner had a prior conviction for first degree burglary while at the same time convincing the jury that Petitioner was a resident of the address he was alleged to have previously burglarized." Pet. at 9; Memo in Support at 19-20.[2/]

While Petitioner has narrowed the issues in his Petition, this Court will not have to address the merits of those issues. The Petition is time barred. In our Motion to Dismiss we alleged that Petitioner filed his present Petition for Writ of Habeas Corpus on June 26, 2007, and that because it had been due under the AEDPA statute of limitations on August 9, 1998, *see* Motion to Dismiss at 8 (citing *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001)), the Petition was almost nine

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2. We originally believed Petitioner was contending that appellate counsel performed unreasonably both with respect to the prior-conviction finding (appellate counsel failed "to raise a legal assertion that the prior conviction at issue was unconstitutionally obtained"), and with respect to the guilty verdicts of first degree burglary and grand theft at the 1996 trial. *See* Pet. at 10-12; Memo in Support at 16-18. Apparently, as with trial counsel, Petitioner is only challenging and seeking habeas relief from appellate counsel's performance regarding the prior-conviction finding.

years late. Petitioner claims that he filed the Petition under the "Mailbox Rule" on February 21, 2007, *see* Opposition at 11 (citing e.g., *Houston v. Lack*, 487 U.S. 266, 276 (1988)), and that it was otherwise not late. Petitioner offers four arguments in support of his conclusion. None has merit.

A. Equitable Tolling

First, Petitioner argues that he is due an "equitable tolling" of the statute of limitations from the time his state judgment became final until the time he discovered trial and appellate counsels' "fraud in concealing the legal bases" of the current IAC and prosecutorial misconduct claims. Petitioner then asserts that while the statute of limitations began to run in March 2005 when he came upon *People v. Davis*, the statute was equitably tolled again almost immediately thereafter by, among other things, his confinement in a Security Housing Unit and his "restricted" use of the law library. Petitioner asserts that he diligently pursued his rights and that this second round of equitable tolling lasted until March 2006, when he commenced state collateral review of the present IAC and prosecutorial misconduct claims and statutory tolling under 28 U.S.C. § 2244(d)(2) kicked in. Opposition at 2-14.

The first link in the chain that comprises Petitioner's equitable tolling argument—his claim that he is due such tolling from August 9, 1997 until March 2005 on "fraudulent concealment" grounds—is broken. As we noted in our Motion to Dismiss, no court has yet invoked the doctrine of "fraudulent concealment" to equitably toll the AEDPA statute of limitations. And more generally, the Ninth Circuit has declared that in order to receive equitable tolling of a statute of limitations under a "fraudulent concealment" theory the claimant must "allege facts showing affirmative conduct upon the part of *the defendant* which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Rutledge v. Boston Woven Hose and Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978) (emphasis added). Thus, to succeed on his "fraudulent concealment" theory Petitioner must show that the defendants in this case, both his Warden and the Director of California Department of Corrections and Rehabilitation, engaged in affirmative conduct from August 1997 to March 2005 that would have led a reasonable person in Petitioner's position to believe he had no basis to challenge the performance of trial counsel,

appellate counsel, and the prosecutor vis-a-vis the 1988 burglary conviction. Petitioner does not meet this burden. Clearly Petitioner's allegation that trial and appellate counsel engaged in fraudulent concealment is not a blaming of *defendant*.

Petitioner calls Respondent's invocation of *Rutledge* "verbal karate" and "wholly frivolous." Opposition at 11. According to Petitioner, "It is trial and appellate counsel who are the 'would-be-defendants' once a suit is commenced against them." As this Court is undoubtedly aware, however, a habeas action is an attack by a person in custody against the legality of that custody, *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973), with the named defendant being the person who has day-to-day control over the habeas applicant (typically the prison warden), *Rumsfield v. Padilla*, 542 U.S. 426, 435 (2005); *Brittingham v. United States*, 982 F.2d. 378, 379 (9th Cir. 1992). In other words, it is the State that must show the legality of the prisoner's conviction and custody. If this Court ever reaches the merits of Petitioner's present claims it will be the State—not trial and appellate counsel—who will be arguing that trial and appellate counsel did not provide Petitioner with ineffective assistance.

In any event, in his Opposition Petitioner wholly fails to show the *affirmative conduct* engaged in by trial and appellate counsel that *fraudulently concealed* the cases of *People v. Davis* and *People v. Gauze* from Petitioner for almost seven years and kept him from learning the state-law rule that generally one cannot be convicted of burglarizing his or her own house. One cannot imagine what counsel may have done, but Petitioner's apparent reliance on such un-proffered speculation is insufficient. Conclusory allegations of equitable tolling are insufficient. *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *see also Roberts v. Cockrell*, 319 F.3d 690, 695 (5th Cir. 2003). That trial and appellate counsel never told Petitioner of the *Davis* and *Gauze* cases, nor made a *Davis/Gauze* argument themselves, is not evidence of affirmative fraudulent concealment. Counsels' inaction doesn't prove anything. Even if counsel didn't know of *Davis* and *Gauze* that fact wouldn't help Petitioner. Mere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified. *Miranda v. Castro*, 292 F.3d at 1066-67; *see Lawrence v. Florida*, 549 U.S. —, 127 S. Ct. 1079, 1085 (2007). In short, Petitioner is essentially asking this Court to find affirmative

acts of fraudulent concealment from seven years of silence by trial and appellate counsel. A more reasonable speculation (if there is such a thing) is that trial and appellate counsel knew of *Davis* and *Gauze*, knew that Petitioner was claiming the 1988 burglary conviction was a burglary of his own house, but knew of other facts that made *Davis* and *Gauze* inapplicable or otherwise left any challenge to the prior without reasonable basis.

That Petitioner knows he cannot show that trial and appellate counsel affirmatively and fraudulently concealed the legal bases of his present claims from him is best evinced by the fact that a large part of his equitable tolling argument is that counsel performed ineffectively in not bringing a *Davis/Gauze* challenge themselves to the 1988 burglary conviction. *See* Opposition at 2-5, 12, 13-14. Put differently, Petitioner's argument is that this Court should find (1) that trial and appellate counsel were ineffective in not challenging the prior conviction (and arguing prosecutorial misconduct); (2) that given that finding Petitioner is due multiple years of equitable tolling, and (3) Petitioner can therefore again have his IAC claims (and the prosecutorial misconduct claim) addressed on the merits. Petitioner is carving out an example of equitable tolling that would swallow the rule that equitable tolling is "unavailable in most cases." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). No court has invoked equitable tolling in the manner Petitioner requests.

Petitioner's reliance on *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003), *see* Opposition at 5-6, is misplaced. That case is distinguishable. There, counsel effectively abandoned his client. Counsel failed to file a federal habeas corpus petition on behalf of his client in spite of his being hired to do so nearly a year beforehand, and also failed to communicate with his client despite inquires from the client and his mother. The Ninth Circuit found this to be misconduct "sufficiently egregious" to warrant tolling of the AEDPA's statute of limitations. Here, by contrast, the lawyers at issue were trial and appellate counsel respectively, not federal habeas counsel. And there exists no evidence of misconduct by them—simply the allegations of ineffectiveness that Petitioner wants to use both for equitable tolling and habeas relief purposes. In short, counsels' failure to challenge the prior conviction at trial or on direct review or to alert Petitioner of the alleged basis for the challenge does not constitute "extraordinary circumstances" that prevented Petitioner from filing a timely federal

petition.

B. State-Created Impediment

28 U.S.C. § 2244(d) provides in relevant part that the statute of limitations runs from the latest of either "(A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review," or "(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed." According to Petitioner, the state-created impediment" placed on him was "the State's failure to provide [him] with the effective assistance of counsel," and that even though this impediment was removed when he learned of *People v. Davis* in March 2005, the "'impediment' became reimposed" once Petitioner informed trial and appellate counsel of the issue and both they and the State "failed to take corrective action." Opposition at 14-16

As we noted in our Motion to Dismiss, this argument fails (for among other reasons) because under 28 U.S.C. § 2244(d)(A)(2) the actions of defense counsel at trial and on appeal do not constitute "State action." *Dunker v. Bissonnette*, 154 F. Supp. 2d 95, 104 (D. Mass. 2001); *Ramos v. Carey*, 2003 WL 21788799, *2 (N.D. Cal. July 31, 2003). Petitioner responds that *Dunker* and *Ramos* are inconsistent with the United States Supreme Court decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), and that this Court must follow *Coleman*. Opposition at 15. *Coleman v. Thompson* is, of course, entirely distinguishable. It deals with procedural default—the principle that a federal habeas court may not review a federal constitutional claim if the decision of the state court on the claim rests on a state-law ground that is independent of the federal question and adequate to support it. 501 U.S. at 731-32. If a state court's decision rests on an independent and adequate state law ground denying relief, federal habeas corpus is barred unless the prisoner can show cause and prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice. *Poland v. Stewart*, 169 F.3d 573, 577 (9th Cir. 1999). We agree with Petitioner that *Coleman* held that under certain circumstances ineffective assistance of counsel could constitute "cause" sufficient to excuse a habeas applicant's procedural default in state court of a federal constitutional claim. 501 U.S. at 752. However, that has nothing to do with the AEDPA statute of

limitations and whether ineffective assistance of counsel can constitute a state-created impediment to filing a timely federal habeas petition in the first instance. *Dunker* and *Ramos* answer that question in the negative.[3/]

Petitioner's reliance on *Day v. McDonough*, 547 U.S. 198, 210 (2006), is also misplaced. Petitioner cites it for the proposition that habeas courts "can still determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred." Opposition at 16. The High Court made that statement in the context of discussing whether a district court may dismiss a federal habeas petition as untimely under AEDPA, despite the State's failure to raise the one-year limitation in its Answer to the habeas petition or its erroneous concession of the timeliness issue. 547 U.S. at 205. The High Court did not hold that s habeas court may deny, on "interests of justice" grounds, an otherwise timely and meritorious motion to dismiss a habeas petition due to the applicant's failure to comply with the AEDPA statute of limitations.

And in no way do the interests of justice favor petitioner here. He obviously knew of the factual bases of his present claims (that in 1988 he burglarized his own house) in 1988 and he claims he told counsel of this in 1996 and 1997. Yet from 1997 onward he did nothing with those facts. The interests of justice favor dismissal here. "The AEDPA statute of limitations promotes judicial

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3. Further, with respect to procedural default, Petitioner asserts that it is "not surprising" that we have not alleged procedural default in connection with the untimeliness findings by the state superior court and state supreme court on the habeas (exhaustion) petitions Petitioner filed in those respective courts in March 2006 and August 2006, respectively. *See* Exhs. H, K. Petitioner states that a procedural default claim by Respondents would be so meritless as to be "frivolous." Opposition at 10 n.3. Petitioner fails to understand why we have not alleged procedural default. The State invokes procedural default when the merits of a federal habeas claim are on the table. The State does not invoke procedural default when it is not addressing the merits of a habeas petition but is instead moving that the entire petition be dismissed as time barred. We are certainly reserving our right to invoke an "untimeliness" procedural default to Petitioner's present claims should this Court deny our dismissal motion and order us to answer the merits of Petitioner's claims. Although Petitioner calls the state courts' untimeliness findings, "objectively unreasonable," Opposition at 10 n.3, this Court need not delve into that question, or otherwise determine whether Petitioner's state petitions were "properly filed" so as to provide him statutory tolling from March 2006 to February 27, 2007, under 28 U.S.C. § 2244(d)(2) and *Evans v. Chavis*, 546 U.S. 189 (2006). This Court need not resolve that question because, as we have demonstrated, Petitioner's statute of limitations expired on August 9, 1998, long before March 2006 and any statutory tolling could have begun.

efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000).

C. Newly Recognized, Retroactive Constitutional Rule

28 U.S.C. § 22244(d)(1)(C) provides that the limitations period begins on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Petitioner claims that if his limitations period did not begin to run in March 2005, it certainly began to run on June 20, 2005, when the United States Supreme Court decided *Rompilla v. Beard*, 545 U.S. 374 (2005). According to Petitioner:

> In *Rompilla*, the Supreme Court, for the very first time, held that an attorney's failure to conduct an adequate investigation of prior convictions amounted to deficient performance, *see* 545 U.S. at 383, that was sufficiently prejudicial to sustain a finding of ineffective assistance of counsel. *See id.*, at 390. Thus, the *Rompilla* Court announced a "new rule." And because *Rompilla* is a habeas proceeding, it necessarily follows then, a fortiori, that it has been "made retroactively applicable to cases on collateral review" as the holding is dependent on retroactivity, i.e., Rompilla could not have obtained the relief he did unless the decision called for retroactive application.

Opposition at 18-19.

Petitioner is wrong. "The Court's decision in *Rompilla* was another interpretation of the Court's long-standing principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) []. It did not set forth a 'new rule of law.'" *In re Hutcherson*, 468 F.3d 747, 748 (11th Cir. 2006). As the opening paragraph of *Rompilla* states, the case called for "specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment." *Rompilla v. Beard*, 545 U.S. at 377. The Court held that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial, including the files of any prior convictions. That *Rompilla* did not "initially recognize" any new rule of law is further demonstrated by the majority's rejection of the dissent's argument that the majority was creating a

"'rigid, *per se* rule' that requires defense counsel to do a complete review of the file of any prior conviction introduced."

> Counsel fell short here because they failed to make reasonable efforts to review the prior conviction file, despite knowing that the prosecution intended to introduce Rompilla's prior conviction not merely by entering a notice of conviction into evidence but by quoting damaging testimony of the rape victim in that case. The unreasonableness of attempting no more than they did was heightened by the easy availability of the file at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt. It is owing to these circumstances that the state courts were objectively unreasonable in concluding that counsel could reasonably decline to make any effort to review the file. Other situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment.

Rompilla v. Beard, 545 U.S. at 389-90.

Rompilla did nothing more than simply apply an existing rule of law. It created no "new rule" of constitutional law. Petitioner's third attempt at showing the timeliness of his habeas petition fails.

D. Actual Innocence

Lastly, Petitioner contends that assuming, for the sake of argument, that he "has exceeded the one-year limitation period of the AEDPA and has failed to demonstrate an entitlement to equitable/statutory tolling," this Court can invoke an "actual innocence" exception and address the merits of his Petition notwithstanding its tardiness. Opposition at 19-27. Petitioner claims that he is actually innocent not only of the burglary and grand theft he was convicted of in 1996, but the 1988 burglary he pleaded guilty to. *Id.*

Neither the United States Supreme Court nor the Ninth Circuit have resolved the question whether the Constitution requires creating an actual innocence exception. *Majoy v. Roe*, 296 F.3d 770 (9th Cir. 2002) (expressing no opinion on the issue).

The Fifth and Seventh Circuits have held that there is no actual innocence exception to § 2244(d). *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002); *Araujo v. Chandler*, 435 F.3d 678, 682 (7th Cir. 2005) ("actual innocence is not a freestanding exception to the statute").

The Tenth Circuit has stated that equitable tolling "would be appropriate . . . when a prisoner is actually innocent." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000). In *Flanders v. Graves*, 299 F.3d 974 (8th Cir. 2002), the Eighth Circuit held that actual innocence is relevant to a claim that

the statute of limitations should be tolled, although the petitioner must still make a showing of reasonable diligence in discovering the facts underlying his claim. In *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit expressly held that actual innocence will excuse a violation of the statute of limitations, applying the standard from *Shlup v. Delo*, 513 U.S. 298 (1995).

Shlup v. Delo held held that the "actual innocence" gateway is satisfied where the petitioner demonstrates that a constitutional violation has probably resulted in the conviction of one who is actually innocent. 513 U.S. at 327. An applicant "does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 329. Since the actual innocence exception is concerned with claims of actual innocence, as opposed to legal innocence, "the district court is not bound by the rules of admissibility that would govern at trial," but instead "must make its determination . . . in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial." *Id.* at 327-28 (citations, internal quotation marks and footnore omitted). *Schlup* continues: "To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence that was not presented at trial." *Id.* at 324. Examples of evidence which may establish factual innocence include credible declarations of guilt by another, *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992), trustworthy eyewitness accounts, *Shlup v. Delo*, 513 U.S. at 298, and exculpatory scientific evidence, *Pitts v. Norris*, 85 F.3d 348, 351 (8th Cir. 1996).

Here, Petitioner offers nothing in the way of credible declarations of guilt by another, trustworthy eyewitness accounts, or exculpatory scientific evidence, but this Court need not determine whether Petitioner has otherwise proffered sufficient credible evidence that was not presented at his 1996 trial that shows he is probably actually innocent of burglary and grand theft. This is because he has made no showing of due diligence between 1996 and now in discovering and presenting the facts underlying the actual innocence claim. *See* Opposition at 20-25.

This Court also need not decide the question of Petitioner's actual innocence of the 1996 crimes

because he has clearly not shown he is actually innocent of the 1988 burglary to which he pleaded guilty. As stated, the "actual innocence" exception is concerned, as its very name sets forth, with actual innocence, not legal innocence. *Schlup v. Delo*, 513 U.S. at 327-28. Petitioner's entire showing of his innocence of the 1988 burglary concerns his legal innocence—that he burglarized his own house and that under state law that does not constitute a crime. Opposition at 25-26. *Petitioner does not even allege*, must less sufficiently demonstrate, that someone else committed the 1988 burglary, or that any entry by him was without "intent to commit grand or petit larceny or any other felony." Cal. Penal Code § 459. Furthermore, under California law a person can be convicted of burglarizing his or her own house if the prosecution can show that the defendant did not have an unconditional possessory right to enter his or her family residence. *People v. Smith*, 142 Cal. App. 4th 923, 930, 48 Cal. Rptr. 3d 378 (2006). For all we know, in 1988, when Petitioner pleaded guilty to burglarizing his own house, he did so because the facts demonstrated that at the time of the entry with felonious purpose he was estranged from the family and could not enter without permission. *People v. Gauze* indicated that, under ordinary circumstances, "no danger arises from the mere entry of a person into his own home, no matter what his intent is. He may cause a great deal of damage once inside. But no emotional distress is suffered, no panic is engendered, and no violence necessarily erupts merely because he walks into his house." 15 Cal. 3d at 715. It may be that here these circumstances did arise from Petitioner's 1988 entry into his family home. He certainly has not proven the contrary, as is his obligation.

Again, Petitioner has not even truly offered a showing of "actual innocence," much less satisfactorily shown it.

Petitioner's present application for federal habeas corpus relief is time barred.

CONCLUSION

WHEREFORE, RESPONDENTS RESPECTFULLY PRAY that this Court dismiss the Petition for Writ of Habeas Corpus, with prejudice, as time barred.

Dated: January 30, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Wills v. Tilton, et al.***
No.: **C 07-03354 CW (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 31, 2008, I served the attached **REPLY TO PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THE PETITION FOR WRIT OF HABEAS CORPUS DUE TO PETITIONER'S FAILURE TO COMPLY WITH THE STATUTE OF LIMITATIONS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Dale G. Wills
J-16405, C-5-225
Corcoran State Prison
P.O. Box 5246
Corcoran, CA 93212-5246

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 31, 2008, at San Francisco, California.

J. Hum
Declarant

J. Hum
Signature

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